RE CHOR SAW OON, EX P TAN JIAK CHYE

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[BANKRUPTCY NO: 29-452-94]
7 JUNE 1999

BANKRUPTCY: *Petition - Stay of proceedings - Act of bankruptcy - Failure to comply with bankruptcy notice - Whether court may order stay after presentation of petition - Bankruptcy Act 1967, ss. 10, 97*

CIVIL PROCEDURE: *Stay of proceedings - Bankruptcy petition - Application for stay pending judgment debtor's application for leave to appeal - Whether appeal would be rendered nugatory - Repercussions and circumstances involved - Balance of justice*

The SAR made a receiving order for the protection of the judgment debtor's ('JD') estate and adjudged him a bankrupt. The JD's appeal to the judge in chambers against the receiving and adjudication orders was refused and this was upheld by the Court of Appeal. This was the JD's application for a stay of proceedings pending its application for leave to appeal to the Federal Court.

Held:

[1] An appeal shall not operate as a stay of execution, or of proceedings, under the decision appealed from. It follows therefore that an application for leave to appeal, which is very much less than an appeal, shall not operate as a stay of execution, or of proceedings, under the decision appealed from.

[2] Sections 10 and 97 of the Bankruptcy Act 1967 ('the Act') provide that the court, may at any time after the presentation of the bankruptcy petition, stay an action. However, notwithstanding the provisions of s. 6(4) of the Act, where in a bankruptcy petition the act of bankruptcy relied on concerns the failure to comply with the bankruptcy notice to pay the judgement debt, the mere fact that an appeal is pending over the judgement is not a sufficient ground for staying the proceedings upon the petition.

[2a] The sum which the JD had deposited with the Assistant Official Assignee was more than enough to pay the judgement creditor in full. This meant that if the application for stay order was refused, that sum under the allocatur could be settled. The subsequent proceedings under this bankruptcy petition would be or ought to be the JD's application for an order of discharge, such that all other proceedings if any to prosecute would be idle, and would even be wholly unreasonable.

[3] Refusing to grant a stay order would foist upon the JD, notwithstanding his deposit of the sum under the allocatur, the disqualification and the disability of a bankrupt, which repercussions could not be undone even if leave to appeal was obtained.

[4] The act of bankruptcy relied upon was the failure to comply with the bankruptcy notice to pay the allocatur. Therefore, since the JD had deposited the sum under allocator for payment to the judgment creditor, and since the JD was entitled to exhaust his rights, and since the judgment creditor was secured, there were sufficient reasons to grant stay.

[Application for stay of proceedings granted.]

Case(s) referred to:
Re Flatau [1888] 22 QBD 83 ***(refd)***
Re Low Kok Tuah [1997] 4 CLJ 185 ***(refd)***
Re Walter Su [1987] 1 MLJ 44 ***(refd)***
Salim Ismail & Ors v. Lebbey Sdn Bhd (No 1) [1997] 1 CLJ 98 ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 6(4), 10, 97

For the appellant - Tan Beng Hong (Rajasingam with him); Tan Beng Hong
For the respondent - Toh Lee Hong (Kek Boon Wei with him); Kek Ooi & Lee Hong
For official assignee - Dharmasegaran

Reported by Sherin Kunhibava/M Maheswaran

JUDGMENT

Jeffrey Tan J:

This is the judgment debtor's application (encl. 50 dated 31 May 1999) to stay all proceedings under the bankruptcy petition, until disposal of the judgment debtor's motion for leave to appeal to the Federal Court against the whole of the decision of the Court of Appeal.

On the background facts, on 26 April 1995, the learned Senior Assistant Registrar made a receiving order for the protection of the estate of the judgment debtor (JD) and adjudged the JD a bankrupt, and on 1 August 1995, Vincent Ng J dismissed the JD's appeal to judge-in-chambers against the receiving order and adjudication order. According to encl. 51 (the affidavit of the JD dated 28 May 1999), and the following are not disputed by the judgment creditor (JC), on 13 April 1999, the Court of Appeal dismissed the

JD's appeal against the order dated 1 August 1995, and on 6 May 1999, the JD filed an application for leave to appeal to the Federal Court against the whole of the decision of the Court of Appeal.

It cannot be gainsaid that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from. Naturally, an application for leave to appeal, which is very much less than an appeal, shall also not operate as a stay of execution or of proceedings under the decision to be appealed from (see *Re Low Kok Tuah* [1997] 4 CLJ 185, where Low Hop Bing J held "that there has to be a proper and valid appeal pending in the court before an application for stay may be considered").

Nonetheless, with regard to bankruptcy proceedings, "the court may any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor" (s. 10 of the Bankruptcy Act 1967), and, "the court may at any time for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to conditions as the court thinks fit" (s. 97 of the Bankruptcy Act 1967). Although it should be added, notwithstanding the provisions of s. 6(4) of the Bankruptcy Act 1967, that when in a bankruptcy petition the act of bankruptcy relied on is the failure to comply with the bankruptcy notice to pay a judgment debt, the mere fact that an appeal is pending over the judgment is not a sufficient ground for staying the proceedings upon the petition (*Re Flatau* [1888] 22 QBD 83; *Re Walter Su* [1987] 1 MLJ 44).

Predictably, in their respective affidavits, the JD contended that there are merits in his application for leave to appeal, whilst the JC contended that there are no prospects of success in the intended appeal. Mr Tan Beng Hong for the JD entreated that the stay sought is only until disposal of the leave application, whilst Miss Toh Lee Hong for the JC objected to a stay. However, there is no dispute whatsoever that the JD has deposited the sum of RM209,565.51, which according to Mr Dharma for the assistant official assignee is more than enough to pay the JC in full and would be released to the JC upon the request of the JC, with the assistant official assignee.

"The paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject matter of the appeal ... is that the appeal ... if successful, should not be rendered nugatory" (*See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299; [1995] 3 MLJ 598, 610 per Gopal Sri Ram JCA). In deciding whether to grant a stay, the court has to balance the .... repercussions" (*Salim Ismail & Ors v. Lebbey Sdn Bhd (No 1)* [1997] 1 CLJ 98; [1997] 2 MLJ 1 per Mahadev Shankar JCA),

the court has to have regard to all the circumstances of the case (*Re Walter Su [supra]* 45).

And in the instant case, the balance is in favour of a stay. The act of bankruptcy relied on is the failure to comply with the bankruptcy notice to pay the sum under allocatur dated 9 February 1994. But that sum has been deposited since with the assistant official assignee. And since that sum has been deposited already with the assistant official assignee, it means, even if a stay is refused, that the sum under the allocatur would be settled and that the next proceeding under this bankruptcy petition would be or ought to be the JD's application for an order of discharge, such that all other proceedings if any to prosecute this bankruptcy petition would be idle, and would even be wholly unreasonable. On the other hand, a refusal of a stay would foist upon the JD, notwithstanding his deposit of the sum under the allocatur, the disqualification and disability of a bankrupt, which repercussions could not be undone even if leave to appeal is obtained. In the circumstances of the case, when the act of bankruptcy relied on is the failure to comply with the bankruptcy notice to pay the allocatur dated 9 February 1994, whereas the JD has deposited the sum under allocatur dated 9 February 1994 for payment to the JC, whereas the JD is entitled to exhaust his rights, and whereas the JC is not unsecured, there is sufficient reason to grant the stay.

Accordingly, it is therefore ordered that all proceedings under the bankruptcy petition be stayed until disposal of the JD's application for leave to appeal to the Federal Court.